United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Maffidavit

74-1534

To be argued by
WILLIAM ROCHE BRONNER

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1534

MORTON I. BAUM,
Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

WILLIAM ROCHE BRONNER,
NAOMI REICE BUCHWALD,
WILLIAM G. BALLAINE,
Assistant United States Attorneys, Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1534

MORTON I. BAUM,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Issues Presented For Review

1. Whether the Orange County, New York Sheriff ever acquired custody over the property in issue so as to legitimize his purported sale of that property to Baum.

2. Whether the United States is estopped from contesting the validity of the Sheriff's sale.

3. Whether statutorily improper, but actual, notice of a sheriff's sale is sufficient to discharge federal tax liens.

Statement of the Case

This is an appeal from a memorandum decision of United States District Judge Lee P. Gagliardi, dated May 27, 1975, granting the motion of the United States to dismiss plaintiff's complaint, after allowing reargument of his earlier decision, filed April 2, 1974.

The proceedings below

This action was instituted on September 14, 1972, pursuant to 26 U.S.C. § 7426(a)(2), seeking surplus proceeds allegedly due plaintiff Baum as the result of the nonjudicial sale of a parcel of land by the Internal Revenue Service ("IRS"). Issue was joined, a motion was made by Mid-Hudson Painting & Decorating Co. ("Mid-Hudson") to intervene as a party defendant, and the United States moved for summary judgment dismissing the complaint. Baum cross-moved for summary judgment, and all parties, including Mid-Hudson, stipulated to the facts at issue.* Judge Gagliardi ruled on February 14, 1974 (filed April 2, 1970) that in the application of the proceeds of the IRS levy sale the United States was entitled to priority over Baum as respects all of its federal tax liens.

Thereafter, both sides sought reargument so as to resolve certain remaining issues: the rights of the proposed intervenor Mid-Hudson; application of monies which even under the Government's theory of the case were surplus monies; and interpretation of the statutory provisions regarding the requirement of notice of sale for recently filed IRS liens. Reargument was granted, and on May 29, 1975, Judge Gagliardi filed a memorandum opinion finding that plaintiff Baum had no interest in any surplus proceeds and granting summary judgment dismissing the complaint. Judge Gagliardi did not explicitly determine the motion to intervene.

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* The parties did not stipulate to the precise amount of money due IRS from the taxpayer on the various tax liens involved.

Statement of Facts

The taxpayer, J.W. Construction Corp., not involved herein, owned realty and personalty located in Orange County, New York, and owed money to a variety of creditors. The IRS filed notices of liens against the taxpayer on four separate dates, covering taxes which with statutory additions aggregated $27,045.94 as of May of 1972. The first notice, covering taxes totalling $9,092.98, was filed June 3, 1971. Subsequent to this notice, but before the other three notices of liens were filed, Mid-Hudson entered a judgment against the taxpayer for approximately $7,500. Mid-Hudson delivered an execution on its judgment to the Orange County Sheriff on August 30, 1971. Ten days later, on September 9, 1971, the IRS, in order to collect all taxes due from the taxpayer, effectuated a levy upon the taxpayer's real property by physically posting a notice of seizure on the land, and hand delivering a copy of the notice to the taxpayer. The sheriff acted on Mid-Hudson's execution on October 4, 1971 by posting his own notice claiming seizure of the same property;* the sheriff's notice was physically affixed directly over the IRS notice.

The sheriff conducted an execution sale on March 7, 1972. No written notice of that sale was ever sent to IRS; however, IRS agents learned of the sale, appeared at it, and publicly announced that the sale was subject to federal tax liens and to prior levy and seizure. A previously submitted bid of $5,000 by the first mortgagee was thereupon withdrawn, and plaintiff-appellant Baum, as attorney and agent for a junior creditor, then "purchased" for $5.00.

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* The sheriff also presumably filed a notice of levy in the county clerk's office on the same date; this question is not addressed in the stipulation of facts.

Thereafter, by previously published notice of sealed bid sale, the same property was sold on March 17, 1972, by IRS to one Wilkin for $31,010.00. Thus, under the Government's view, there is a surplus of approximately $4,000.* Under Baum's view, however, the surplus is greater, on the theory that the sheriff's sale divested the lien being foreclosed and all others junior to it, including three of the federal tax liens covering taxes exceeding $15,000.

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* This is without consideration of the relative priority of the IRS liens as compared with other liens, or the effect on the priorities herein of the concomitant IRS seizure and sale of the taxpayer's personal property. These issues need not be reached, since the IRS concedes that, if Mid-Hudson's lien survived the sheriff's sale, it is prior to certain IRS liens, and entitled to full payment. No creditor other than those involved herein has filed a claim with the IRS, or brought an action, and the time for doing so has long since expired. Thus, if the Government prevails herein, Mid-Hudson will be paid its claim in full, and the United States will retain the rest of the sale proceeds. See 26 U.S. § 6342(b).

Baum has challenged the propriety of the United States' failure to invoke the statute of limitations against Mid-Hudson. We express no position herein on the issue of whether Baum can assert that Mid-Hudson was time-barred, but we should note that the administrative record indicates that a claim for surplus proceeds by Mid-Hudson was filed and has never been rejected by the IRS. In this light, it was perfectly proper not to have invoked this affirmative defense against Mid-Hudson.

ARGUMENT

POINT I

Baum never Acquired any Interest of the Taxpayer or Mid-Hudson in the Property.

Plaintiff-appellant Baum claims an interest in surplus funds from an IRS sale by virtue of his purchase at a sheriff's sale held at a date earlier than the IRS sale but held after IRS levy. Judge Gagliardi determined that the sheriff never transferred any interest to Baum at the execution sale, and therefore dismissed his complaint. That decision was correct.

A. The prior IRS levy prevented the sheriff from ever acquiring anything to sell.

Once the IRS has levied upon and seized a taxpayer's property, there is nothing left for the sheriff to execute upon. The IRS levy transfers almost complete ownership to the Government. *Phelps* v. *United States*, — U.S.—, 43 U.S.L.W. 4590, 4592, 75-1 U.S.T.C. § 9467 (May 19, 1975); *United States* v. *Pittman*, 449 F.2d 623, 626 (7th Cir. 1971); *see Rosenblum* v. *United States*, 300 F.2d 843, 845 (1st Cir. 1972). It vests the Government with exclusive and adverse possession of the taxpayer's entire interest in the property as of the date of the IRS levy. Thereafter, the taxpayer is relegated to an interest in surplus sale proceeds over the amount of his tax debt; he loses his interest in the real property. An IRS levy is self-executing, 26 U.S.C. § 6331,* and is effective upon delivery of notice of levy and seizure, without more. *Rosenblum* v. *United States*, *supra*, 300 F.2d at 845.

* The effect of a seizure by IRS is a question of federal law. *United States* v. *Brosnan*, 363 U.S. 237, 240 (1940).

The effective date of the IRS levy was therefore September 9, 1971, the date of posting of the property. Thus, if the sheriff ever acquired anything to sell to Baum, it must be because the sheriff acquired it before the effective date of the IRS levy. After the IRS levy, the taxpayer had no remaining leviable interest.

There appears to be no New York case which directly determines the effective date of the acquisition of possession by a sheriff acting on a judgment execution against real property.* The two possibilities are the date the sheriff receives the execution or the date the sheriff levies upon the execution. The logic of the situation requires that possession await the date of the sheriff's levy. However, here the effective date of the IRS levy intervened between the date of receipt of the execution and the date of the sheriff's levy, and thereby rendered the sheriff's levy ineffective.

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* An execution is legal process (issued by the judgment creditor's attorney as an officer of the court) directed to the sheriff and authorizing him to seize personal and/or real property of the judgment debtor. N.Y.C.P.L.R. § 5230 (McKinney 1963); *Smith* v. *Top Notch Bakers*, 206 Misc. 265, 134 N.Y.S. 2d 744, 746 (Westchester Cty. Ct. 1954), *aff'd*, 286 App. Div. 1016, 144 N.Y.S. 2d 536 (2d Dept. 1955), *app. den.*, 1 App. Div. 2d 785, 149 N.Y.S. 2d 226 (2d Dept. 1956). Upon receipt of a proper execution, the sheriff is required to attempt to locate assets of the judgment debtor. Should real property be discovered, the sheriff must levy upon and sell the real property. A valid levy brings the property assets into *custodia legis* so that it may be sold in satisfaction of the judgment. *Cf. In re General Assignment for Benefit of Creditors of Mehr*, 20 Misc. 2d 481, 186 N.Y.S. 2d 976 (Sup. Ct. N.Y. 1959).

A levy on real property pursuant to a judgment lien is accomplished by exercising dominion over the property, by posting the property involved with a notice of levy. *See Wachtell, New York Practice Under the CPLR* (1966), at 189; *Flying Tiger Line* v. *Spinetta*, 190 Misc. 886, 76 N.Y.S. 2d 67, 68 (Sup. Ct. N.Y. 1948); *see also* N.Y.C.P.L.R. §§ 5235, 6216.

The Supreme Court, on facts similar to those involved herein, has stated that where the United States acquired possession first, the sheriff could not acquire possession thereafter. The Court explained that judgment or other liens attach to specific property by reducing it to "possession." At such time, priority rights otherwise afforded the United States to the property of a debtor cannot be invoked, because the property is out of the debtor's "possession." *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 366 (1953); *see also* 26 U.S.C. § 6332(a), N.Y.C.P.L.R. § 5203. This same possession would be required in order for Baum to invoke the doctrine of *custodia legis* so as to prevent the United States from acquiring an insurmountable "priority" by reason of an effective tax levy.

The type of possession which is required is actual physical possession (whether symbolic or otherwise), such as is acquired in New York by levy upon a judgment execution, but not by mere delivery of the execution alone. At the time of the delivery of the execution, which is itself merely an order to do something in the future, there had been no attempt by the sheriff to satisfy the debt out of any specific property, real or personal. Only by levy does the sheriff subject particular property to the debt owed the judgment creditor. *See generally, Stallnecht* v. *Gilbert Appliance Corp.*, 144 Misc. 626, 259 N.Y.S. 189 (Monroe Co. Ct. 1932); *City of New York* v. *Panzirer*, 23 App. Div. 2d 158, 259 N.Y.S. 2d 284, 288 (1st Dept. 1965).

There is also significant federal policy militating against fixing the effective date of acquisition of possession at the time the sheriff receives the execution. No IRS levy sale would be free from doubt as to the efficacy of the title passed, since it would never be certain, at least not without extensive review of the sheriff's own

records, *see* N.Y.C.P.L.R. § 5230(d), whether executions were outstanding on the property levied upon by IRS. Executions can remain valid and outstanding for some time, *see* N.Y.C.P.L.R. § 5230(c), and whenever acted upon would retroactively invalidate the IRS sale. The Congress could not be presumed to have intended the Tax Lien Act of 1966, P.L. 89-819, to have had such disruptive effects. Thus, at the time the sheriff attempted to acquire the possession necessary to affect title to the property, he was precluded from doing so by the prior IRS levy.

Moreover, the doctrine of federal supremacy, and enabling legislation thereunder, prevented the sheriff's levy, or any state-creation procedures or remedies, from having any effect on the property or the taxpayer's or creditor's interests therein. Section 2463 of Title 28, U.S.C. states that property held under federal seizure shall not be repleviable, and the statute has been interpreted to prohibit virtually all state-authorized seizures of property detained or levied upon by federal officers. *New Hampshire Fire Ins. Co.* v. *Scanlon*, 362 U.S. 404, 409 (1960); *see also Starr* v. *Salemi*, 329 F. Supp. 1150, 1151 (N.D. Ill. 1971).* The cases reason that state interference with the collection of federal revenues would violate the Supremacy Clause of the Constitution. *See, e.g., Burnet* v. *Harmel*, 287 U.S. 103, 110 (1932); *Fried* v. *N.Y. Life Ins. Co.*, 241 F.2d 504, 505-506 (2d Cir. 1957); *United States* v. *Ocean Accident & Guarantee Corp.*, 76 F. Supp. 277 (S.D.N.Y. 1948).

Thus, the Internal Revenue Code does require deference to attachments or executions *already effected* on

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* In addition, 26 U.S.C. § 7421 prohibits any suits other than certain federally-authorized actions for the purpose of restraining the collection of any tax; this statute has been broadly interpreted as well. *See, e.g., Bob Jones University* v. *Simon*, 416 U.S. 725 (1974).

the date of the levy, in a spirit of comity and in recognition of the applicability of the principle of *custodia legis*. But the same principle has been incorporated into the federal statutes so as to protect IRS levies from subsequent state executions.

B. By bringing a surplus proceeds action, Baum has conceded the validity of the levy and the resultant invalidity of the sheriff's sale.

Because Baum seeks surplus proceeds received at an IRS levy and sale pursuant to 26 U.S.C. § 7426(a)(2), he is obliged to concede that the IRS has effectively sold the real property involved. This concession, however, conflicts diametrically with his contention that he purchased from the sheriff.

Under 26 U.S.C. § 7426(a)(2) and (b)(3), a surplus proceeds action may be brought by a person who claims to be "legally entitled to the surplus proceeds of [a levy] sale." In such an action, a money judgment for the surplus is the only form of relief available.*

Baum cannot prevail in a surplus proceeds action. If the sheriff's levy were valid, the IRS would never have obtained legal possession over the property, notwithstanding its notice of levy, as noted above, and title would never have passed pursuant to the purported IRS sale. The purchaser from IRS would, therefore, have bought a completely empty title, and there would be no proceeds which Baum could claim, since nothing of his would have been sold.

On the other hand, if the sheriff's levy was ineffective, as we contend, Baum is still not helped, since he then acquired no right to the alleged surplus at the IRS sale, as noted in Point I A, *supra*.

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* Baum's action has never been dominated as or claimed to be a wrongful levy action under 26 U.S.C. § 7246(a)(1) and (b)(2), nor could it be so denominated on the instant facts.

C. The IRS levy prevented satisfaction of the execution.

Baum, no doubt realizing the inconsistency of his position that both sales are valid, has attempted to argue that he did not buy real property at the sheriff's sale, but rather that he purchased the "equity of redemption of the taxpayer." This ingenious argument flies in the face of the facts and in any event does not advance his cause.

Baum has contended that, since the IRS levy could not have taken the taxpayer's statutorily protected federal equity of redemption under 26 U.S.C. § 6337, this interest could have been reached by an intervening valid sheriff's execution and sale. While we have demonstrated above that the sheriff's sale involved herein was invalid,* even assuming the contrary, the sheriff did not purport to levy upon the taxpayer's equity of redemption, which as a chose in action would be considered personalty; *see Wachtell*, *supra*, at 188-189. Rather, the sheriff "levied" upon *realty; see* the Sheriff's Deed, Appendix at 7a. Baum has asserted no authority for the proposition that an ineffective levy against realty can be simultaneously effective against personalty.

For that matter, even if the levy had been upon specific personalty, it was too late to be effective. It is well-established that a New York private judgment creates no lien on personalty effective against the United States as lien creditor until after levy. *Thriftway Auto Rental Corp.*, 457 F.2d 409, 411 (2d Cir. 1972). Mid-Hudson's lien therefore could not have been impressed

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* The Government concedes for purposes of this appeal only that the sheriff's levy was procedurally proper. *See, e.g., Community Capital Corp* v. *Lee*, 58 Misc. 2d 34, 294 N.Y.S. 2d 336 (Sup. Ct. Nassau 1968), *but cf. Morgan* v. *Mahar*, 60 Misc. 2d 642, 303 N.Y.S. 2d 575 (Sup. Ct. Nassau 1969). *See also* N.Y.C.P.L.R. § 5236; 26 U.S.C. § 7425, discussed in Point III, *infra; Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939).

upon the personalty (the equity of redemption) until levy. The sheriff's levy occurred at a point in time at which the taxpayer's real property and associated personal property, including the equity of redemption, was in the hands of IRS pursuant to its levy, and therefore beyond the sheriff's reach.

POINT II

The United States is Not Estopped from Contesting the Validity of the Sheriff's Sale.

A. There can be no estoppel against the public interest

Baum contends that the failure of the United States to exercise its right to redeem the property or to bring a state court action to declare the sheriff's sale void precludes the Government from arguing the invalidity of the sheriff's sale in the present context.

The law is clear that estoppel will not lie against the United States where the United States is representing the public interest. *E.g., United States* v. *State of Florida*, 482 F.2d 205, 209-210 (5th Cir. 1973).

It is equally clear that in an action arising out of the attempt by the United States to collect taxes, the United States is in fact representing the public interest, and generally cannot be estopped. *Automobile Club of Michigan* v. *C.I.R.*, 353 U.S. 180, 183 (1957). There is thus a strong policy basis against estoppel.

B. The United States has the absolute right, free from adverse consequences, to choos whether or not to redeem property.

Even were it not the fact that the public interest precludes estoppel in the instant circumstances, Baum

cannot successfully allege estoppel. He lacks either a statutory or a common law predicate for the imposition of estoppel.

The Tax Lien Act of 1966, *supra*, enacted in response to the problems addressed in *United States* v. *Brosnan*, *supra*, and other cases, provides a clear procedure for the divestiture of United States statutory tax liens and for the sale of property free from such liens by other lienors under state-created procedures. *See* Point III, *infra*. One of the compensating provisions of the statutory scheme is 28 U.S.C. § 2410(c), which grants to the United States the right to redeem property sold free from a tax lien within 120 days of sale (before the Tax Lien Act, the redemption period was one year). Baum appears to claim (brief at 15-16) that the non-exercise of this right by the United States, which concededly did not redeem the property after the sheriff's sale, estops it from contesting the validity of that sale. However, although the Tax Lien Act created a comprehensive procedure for divestiture of tax liens, yet it contains no sanctions (other than the loss of its lien) flowing from the non-exercise by the United States of its right of redemption. There is therefore no statutory basis for this argument.

Baum's other suggestion (brief at 16) is that the failure of the United States to commence an action in state court to set the sheriff's sale aside precludes the United States from obtaining a declaration of the invalidity of the sheriff's sale in federal court litigation. This argument can be reduced to the proposition that the New York State legislature or judiciary has the power to limit the federal court's jurisdiction in surplus proceeds litigation. But the priority of a federal tax lien is always a federal question, as noted in Point III, *infra*, and it is therefore beyond the competency of the state legislature or courts to limit federal jurisdiction, absent an explicit federal statutory waiver, of which there has been none.

In short, there is simply no statutory basis for construing the rights given to the United States to redeem property or to sue to set sales aside as obligations secured by sanctions. Any estoppel must therefore be based solely upon common law grounds.

C. Baum was neither misled nor prejudiced

> The indispensable elements of an estoppel are ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and an innocent and deleterious change of position in reliance upon that representation. *Williams* v. *Neely*, 134 F. 1, 11 (8th Cir. 1904).

See also, e.g., United Services Automobile Assoc. v. *Royal-Globe Ins. Co.*, 511 F.2d 1094, 1097 (10th Cir. 1975). In the instant case, IRS agents publicly announced at the March 7, 1972 sheriff's sale that the property being sold was subject to federal tax liens, prior levy and seizure and a sealed bid sale to be held on March 17, 1972. Baum was present at the sale and was thus put on notice that the title being sold by the sheriff might be a nullity.

Nevertheless, Baum chose to bid a nominal amount at the sale and he "purchased" the realty for $5.00. Neither by its words nor conduct did the IRS misrepresent its interest in the property or its intentions as regards honoring the title of the purchaser at the sheriff's sale.

In addition, Baum can be prejudiced only to the extent that he has irretrievably changed position or expended money in reliance upon Governmental misrepresentations. Baum had no other means of perfecting a

claim to any surplus proceeds,* and there was no expenditure of money other than $5.00 and the costs of this litigation, both after Baum's being put on notice of the IRS position. Accordingly, there are no grounds whatsoever for estoppel.

POINT III

Assuming the Sheriff's Sale Was Valid, Failure to Join the United States as a Party Defendant or to Give it Notice Prevented Discharge of any of the Federal Tax Liens.

The relative priority of a federal statutory tax lien is a federal question, *United States* v. *Acri*, 348 U.S. 211, 213 (1955). The subject is addressed in 26 U.S.C. § 7425, which establishes the requirements for the discharge of federal tax liens by valid state judicial sale.

This statute provides explicit procedures for divesting IRS liens in judicial proceedings: (1) the joining of the United States as a party defendant, if the United States possesses a lien notice of which had been filed when the action was commenced; and (2) if no such notice was filed, by the giving of a prescribed form of notice to IRS, 25 or more days before sale. *See United States* v. *Biuhm*, 414 F.2d 1240, 1243 (7th Cir. 1969).**

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* The client for which Baum bid was then prosecuting an action against the taxpayer under Article 3A of the New York Lien Law (McKinney 1966) which was later taken to judgment. We understand, however, that no claim is being asserted regarding any right to surplus based upon this judgment or the antecedent *lis pendens* (described at Appendix 76a, No. 3).

** As to the first IRS lien, we contend that the provisions of Section 7425(a) and (a)(1) prevent discharge irrespective of the validity of the sheriff's sale. Mid-Hudson's delivery of the execution to the sheriff was in pursuit of its litigation with the taxpayer; that litigation was encompassed by the terms of 28 U.S.C. § 2410, and was an action in which the United States was

[Footnote continued on following page]

Specifically, Section 7425(b) and (c) provide in relevant part as follows:

> "(b) . . . a sale of property on which the United States has or claims a lien, or a title derived from enforcement of a lien, under the provisions of [the Internal Revenue Code], made pursuant to an instrument creating a lien on such property . . .
>
> (1) shall, except as otherwise provided, be made subject to and without disturbing such lien or title, if notice of such lien was filed or such title recorded in the place provided by law for such filing or recording *more than 30 days before such sale* and the *United States is not given notice of such sale in the manner prescribed in subsection (c) (1)*; or . . .
>
> (c) Special Rules.
>
> (1) Notice of Sale. Notice of a sale to which subsection (b) applies shall be given (in accordance with regulations prescribed by the Secretary of his delegate) *in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale*, to the Secretary or his delegate. (emphasis added)

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not joined. Sale by the sheriff pursuant to an execution is sale by a judicial officer under a judicial writ, and is therefore clearly a judicial sale. There can be no question but that the notices of the IRS tax liens involved herein were properly and timely filed. The senior IRS lien was filed on June, 1971, before the entry of judgment of Mid-Hudson, Appendix at 77a. The stipulated facts do not disclose the date when Mid-Hudson commenced its suit. Section 7425(a)(1) thus prevents divestiture of the senior IRS lien, irrespective of the effect of Section 7425(b) and (c). Notices of the other IRS liens concededly had not been filed when Mid-Hudson commenced its action. We therefore do not invoke Section 7425(a) as regards those liens.

This statute requires that the issuance of formal notice of a judicial sale where subsection (a) does not mandate that the United States be made a party, or of any nonjudicial sale. Notice must be to the Secretary of the Treasury or his delegate (the appropriate IRS officer) a minimum of 25 days before the sale. If this notice is not given in the prescribed way, the sale will not extinguish any of the federal liens. *United States* v. *Ruby Luggage Corp.*, 142 F. Supp. 701 (S.D.N.Y. 1954); *Dime Savings Bank of Brooklyn* v. *Sherman*, 64 Misc. 2d 457, 314 N.Y.S. 2d 86 (Sup. Ct. Nassau 1970). No notice was given to IRS of the instant sheriff's sale.

It is legally irrelevant that in the present case, officers of the IRS may have learned of the sheriff's sale by reading the published notice or otherwise and may have attended it. In the first place, the agents appeared so as to object to the sale, not to consent to it. In the second place, the requirement of formal notice serves the valid purpose of assuring that the proper official, who will recognize the significance of the notice and know how to act and how much time he has to act, will be the person to whom the notice is sent. Improper notice can result in confusion and delay prejudicial to the Government, which the Congress had the power to prevent by properly conditioning the waiver of sovereign immunity involved in Section 7425. Sovereign immunity can only be waived by Act of Congress, and such waiver statutes, including 26 U.S.C. § 7425, are to be read literally. Immunity cannot be waived by federal officers in the absence of statutory authorization. *Minnesota* v. *United States*, *supra*, 305 U.S. at 388-389; *United States* v. *Shaw*, 309 U.S. 495, 500-502 (1940); *United States* v. *United States Fidelity & Guarantee Co.*, 309 U.S. 506, 513 (1940).

The only applicable exception to this rule in the present case, is as regards one federal tax lien, notice

of which was filed on February 18, 1972, less than 30 days before the sheriff's sale date of March 7, 1972. Section (b)(1) of the above-quoted statute provides that notice need not be given for a sale to pass title free of a lien such as this one.

CONCLUSION

The attempted state execution sale was aborted by an IRS levy before the sheriff had levied upon any property. Nothing the sheriff did after the IRS levy had any legal significance. The sheriff's deed to the property, issued in consideration of $5.00 bid and paid by appellant, Baum, is therefore worthless. Thus Baum possesses no interest in the alleged surplus he seeks, and the dismissal of his complaint should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

WILLIAM ROCHE BRONNER,
NAOMI REICE BUCHWALD,
WILLIAM G. BALLAINE,
Assistant United States Attorneys, Of Counsel.

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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 74-1534

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 3rd day of November 1975 she served two copies of the within govt's brief on appeal

by placing the same in a properly postpaid franked envelope addressed:

1) Baum & Gersten, Esqs.,
15 Hamilton Ave.
Monticello, NY 12701

2) Lawrence X. Kennedy, Esq.,
Fabricant, Lipman, Kennedy & Sweeney, P.O. BOX 60,
Goshen, NY

And deponent further says she sealed the said envelope and placed the same in the mail drop for mailing in the United States Courthouse, Annex, Borough of Manhattan, City of New York.
One St. Andrews Plaza,

Pauline P. Troia

Sworn to before me this

3rd day of November 19 75

Ralph L. Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977